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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MDV/159940

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 19, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on September 18, 2014, at Waukesha, Wisconsin.

The issue for determination is whether the agency properly determined the Petitioner divested \$7079.69 and properly determined a penalty period of 29 days beginning April 1, 2014.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Julie Miller

Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On July 7, 2014, an application was filed on Petitioner's behalf for Institutional MA.

3. On July 25, 2013, a CD belonging to the Petitioner was cashed in the amount of \$5,889.69.
4. On July 25, 2013, a deposit of \$4,026.95 was made to a joint account held by Petitioner and her husband at another bank. This included \$3,889.69 from the CD funds and a pension deposit of \$137.26. The Petitioner's husband testified that \$2000 cash was used from the CD funds to pay for living expenses and for Petitioner's caregiver.
5. Petitioner's husband pays \$190/month to his daughter for his portion of the family plan phone bill.
6. Petitioner was admitted to a skilled nursing facility on October 28, 2013.
7. On August 6, 2014, the agency issued a Negative Notice to the Petitioner informing her that the agency had determined she is ineligible for Institutional MA from April 1, 2014 – April 29, 2014 due to a divestment of assets of \$7079.69 including: a \$500 check to Petitioner's grandson, a \$100 check to Petitioner's granddaughter, a \$190 check to Petitioner's daughter, a \$200 check to Petitioner's great-grandchild, a \$100 check to Petitioner's great-grandchild and a \$5889.69 check to herself.
8. On August 6, 2014, the agency issued a Positive Notice to the Petitioner informing her that her application for institutional MA was approved for the period of April 30, 2014 – March 31, 2015.
9. On August 19, 2014, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.

### **DISCUSSION**

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his behalf, transfers assets for less than fair market value, on or after the individual's "look-back date." Wis. Stat. § 49.453(2)(a). "Fair market value" is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred. Medicaid Eligibility Handbook (MEH) § 17.2.1. The "look-back date" is defined as 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant. MEH § 17.3.

If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totaling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application. MEH § 17.5. The ineligibility period begins with the month of the first divesting transfer of assets.

Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance).

A divestment that occurred in the lookback period or any time after does not affect eligibility if any of the following exceptions apply:

1. The person who divested shows that the divestment wasn't made with the intent of receiving Medicaid.

The person must present evidence that shows the specific purpose and reason for making the transfer, and establish that the resource was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that s/he was not trying to become financially eligible for Medicaid are not sufficient. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements.

Any of the following circumstances are sufficient to establish that the applicant/member transferred resources without an intent to qualify for Medicaid:

...

- If an individual had a pattern of charitable gifting, or gifting to family members (i.e. birthdays, graduations, weddings, etc.) prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest

...

This list is not intended to be all inclusive when describing divestments which are permissible because the transfer was made without the intent to qualify for Medicaid. Other situations will arise and in those instances, the person's "intent" must be evaluated on a case-by-case basis to determine whether or not a divestment occurred.

...

3. The ownership of the property is returned to the person in the fiscal group who originally disposed of it.

...

MEH, § 17.4.

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the agency, such as the denial of MA due to a divestment of assets was improper given the facts of the case. See 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists.

In this case, the Petitioner's representatives presented sufficient evidence to demonstrate that \$3889.69 of the CD funds was deposited into the Petitioner's bank account and therefore cannot be considered a divestment. The Petitioner's evidence showed that there was a deposit of \$4,206.95 into the Petitioner's bank account on July 25, 2014. The Petitioner submitted evidence demonstrating that this consisted of a pension deposit of \$137.26 and CD funds of \$3889.69.

The Petitioner's husband testified that \$2000 from the CD funds was used to pay living expenses and for Petitioner's caregiver. The Petitioner's representatives submitted a written statement from the caregiver stating that the Petitioner's husband paid her weekly with cash to provide care to the Petitioner while he was attending kidney dialysis sessions during the period of spring, 2013 – fall, 2013. The statement did not contain specifics with regard to amounts or dates of payment. The Petitioner's husband also testified that he used some of the money to pay living expenses such as gas and groceries. He did not have any receipts for these expenses.

While the Petitioner's representatives were unable to present specific information about the amount of money paid to the caregiver, I recognize that the amount of time and the care that would have been required while the Petitioner's husband attended dialysis and recovered from each treatment would have been significant. I also recognize that Petitioner's husband is of a generation that prefers to use cash for most transactions and that receipts are often not retained for regular and usual living expense purchases.

Therefore, as to the \$5,889.69 from the CD funds, I conclude that there is sufficient evidence to demonstrate these funds were not divested.

As to the gifts to the Petitioner's relatives, the Petitioner's husband testified that he and the Petitioner established a pattern of giving gifts to children and grandchildren. The \$500 check to his grandson was to allow his grandson to purchase tires for his car. An additional \$400 was gifted to his granddaughter and great-grandchildren. I conclude there was insufficient evidence presented by the Petitioner's representatives to demonstrate these gifts were part of a pattern of gift-giving to relatives. Two bank statements alleging two previous gifts, one for \$200 in 2012 and one for \$100 in 2013, does not establish a pattern. Further, gifts of \$900 in 2014 is so inconsistent with the previous gifts of \$200 and \$100 in 2012 and 2013 that there is no evidence of a pattern of gift-giving.

The agency also found a divestment of \$190 for a check to the Petitioner's daughter. The Petitioner's husband testified that \$190 check to his daughter was for his part of the family plan phone bill. The Petitioner's representatives were given the opportunity to present the phone bill as evidence but did not do so.

Based on the evidence and testimony presented, I conclude there is sufficient evidence to demonstrate the funds of \$5,889.69 from the CD were not divested. I further conclude there was a divestment of \$1,090 as follows: a \$500 check to Petitioner's grandson, a \$100 check to Petitioner's granddaughter, a \$190 check to Petitioner's daughter, a \$200 check to Petitioner's great-grandchild and a \$100 check to Petitioner's great-grandchild.

### **CONCLUSIONS OF LAW**

The Petitioner divested funds of \$1,090 to qualify for MA.

**THEREFORE, it is**

### **ORDERED**

That this matter is remanded to the agency to take all administrative steps necessary to determine the penalty period for MA eligibility for the Petitioner based on a divestment of \$1,090. The Petitioner's eligibility date for MA shall be revised accordingly. A notice of the revised penalty period and date of MA eligibility shall be issued to the Petitioner. These actions shall be taken within 10 days of the date of this decision.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

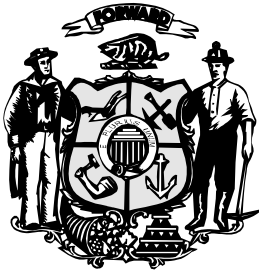
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 31st day of October, 2014

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\sDebra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on October 31, 2014.

Waukesha County Health and Human Services  
Division of Health Care Access and Accountability